

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

75-1319

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

-v.-

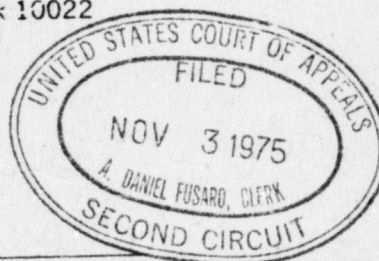
ESTELLE JACOBS,
a/k/a "Mrs. Kramer",
Defendant-Appellee.

*On Appeal from the United States District Court
for the Eastern District of New York*

BRIEF FOR THE DEFENDANT-APPELLEE

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PRELIMINARY STATEMENT

The United States of America appeals from an Order entered on July 21, 1975, in the Eastern District of New York, by the Honorable Edward R. Neaher, United States District Judge, granting a motion to dismiss a count of the indictment against Estelle Jacobs a/k/a "Mrs. Kramer".

On November 11, 1974, defendant-appellee was indicted by a grand jury for the Eastern District of New York (Indictment No. 74CR703) (App.A) for violations of 18 U.S.C. 875(c) (making extortionate threats) and 18 U.S.C. 1623 (making false declarations before a grand jury). Prior to the date set for trial, defendant-appellee moved for an evidentiary hearing and an order to dismiss the indictment. On June 6, 1975, the Honorable Edward R. Neaher heard arguments on the various pre-trial motions.

On July 21, 1975, Judge Neaher granted the motion to dismiss Count Two of the indictment (making false statements before a grand jury), holding that all of defendant-appellee's grand jury testimony must be suppressed because the prosecutorial conduct involved was so offensive to the common and fundamental ideas of fairness as to amount to a denial of due process and impermissible prosecutorial behavior. United States v. Mandujano, 496 F.2d 1050 (5th Cir.), cert. granted, _____ U.S. _____ (No. 74-754, March 24, 1975). The district court noted that although

defendant-appellee was given warnings under the Fifth Amendment and the Sixth Amendment, the entire grand jury proceeding was a violation of her due process rights (App.F-5) and found the questioning concerning criminal activity under the circumstances to be beyond the pale of permissible prosecutorial conduct.

On August 14, 1975, the Government (plaintiff-appellant) filed a timely notice of appeal from the order dismissing Count Two of the indictment. The jurisdiction of this Court is invoked under 18 U.S.C. 3731.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

3. 18 U.S.C. 875(c) states in part:

Whoever transmits in interstate commerce any communication containing any threat to . . . injure the person of another, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

4. 18 U.S.C. 1623 provides in pertinent part:

(a) Whoever under oath in any proceeding before or auxiliary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

FACTS

The facts are not in dispute. The defendant is a housewife who was employed at various times in a credit collection agency. She appeared when summoned, without counsel, before a federal grand jury on June 10, 1974 and on November 14, 1974. The government admits that when the defendant was called to testify before the grand jury, defendant was not just another witness, but was in fact a "putative defendant". The letter authorizing the Special Attorney to present this matter to the grand jury expressly stated:

"Grand Jury Authority:

It is requested that Grand Jury authority be prepared and issued to Edward C. Weiner for the Eastern District of New York. This authorization is needed for his assistance in United States v. John Doe (Woods and Jacobs, 18 U.S.C. 1951) (Appellants Appendix G-2, G-1)"

The warnings given the defendant on June 10, 1974 did not warn her that she was the "subject matter" of the grand jury investigation. The perjury is alleged to have occurred at that appearance before the grand jury, at which time the special prosecutor informed the defendant she was a "witness".

The alleged perjury of June 10, 1974 flows from a tape recorded conversation had by the defendant on May 22, 1973, which tape recorded conversation was in the possession of the grand jury and the prosecutor at the time of the defendant's appearance some thirteen months after said conversation.

The prosecutor in propounding the questions which were the predicate for the alleged perjury apparently read from a transcript of the tape recorded conversation. The prosecutor failed to play the tape recorded conversations of May 22, 1973 to the defendant at the June 10, 1974 Grand Jury appearance. This would have permitted the defendant to refresh her recollection based on voice identity (Appellants Brief xviii-xix).

THE ENTIRE GRAND JURY PROCEEDING
WAS A VIOLATION OF DEFENDANT'S
DUE PROCESS RIGHTS UNDER THE
FIFTH AMENDMENT; DEFENDANT'S
TESTIMONY THEREIN SHOULD BE
SUPPRESSED AND PERJURY COUNT
THEREFORE DISMISSED.

The due process clause, the right to counsel and the grand jury were designed to protect persons against arbitrary and oppressive governmental action. United States v. Calandra, 414 U.S. 338, 343; United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974); cert. granted, 95 S.Ct. 1422 (1975); United States v. Rangel, 496 F.2d 1059 (5th Cir. 1974); American Bar Association Project on Standards Relating to the Prosecution Function, Approved Draft 1971, Section 3.6(d); Katz: Criminal Procedure - Grand Juries - Lack of Miranda Warnings for Virtual Defendant Results in Suppression of Perjurious Testimony, Vol. 53, No.1, Texas Law Review (1974).

I respectfully ask the Court to consider what was perpetrated upon the defendant Estelle Jacobs. She was summoned by subpoena to the Grand Jury on June 10, 1974. The Special Prosecutor had been authorized to submit a criminal case against the defendant to the Grand Jury. The prosecutor and the grand jury were in possession of tape recorded conversation of May 22, 1973, whereby the indictment alleges that the then "putative defendant" is alleged to have violated 18 U.S.C. 875(c).

The defendant herein is fundamentally a housewife who appeared without counsel. The prosecutor failed to inform the defendant that she was a "putative defendant", target or subject of the grand jury investigation. The special prosecutor's express language clearly uses the term "witness" in addressing the defendant (App. D-2-3-4).

The conversation upon which the 18 U.S.C. 875(c) count is predicated is alleged to have occurred on May 22, 1973 approximately one year prior to the June 10, 1974 Grand Jury testimony.

The special prosecutor at no time during the grand jury appearance seeks to refresh the "putative defendant's" recollection by playing the taped conversation.

The defendant was compelled to appear in a strange environment, before a body of some 23 persons, under the auspices of a highly trained and skilled special prosecutor. If this special prosecutor were seeking confirmation of the tape recorded conversation had approximately one year prior to the "putative defendant's" Grand Jury appearance, did due process require that the recording be played to the "putative defendant" to refresh her recollection?

Was it not clearly the intent of the prosecutor to trap Mrs. Jacobs into committing perjury in view of the fact

that he already knew that she was a party in said conversation and to be indicted for violating 18 U.S.C. 875(c). The special prosecutor knew what he was doing. United States v. Thayer, 214 F.Supp. 929, 933 (D. Colo. 1963); Brown v. United States, 245 F.2d 549, 554 (8th Cir. 1957).

When a prosecutor abuses the grand jury proceedings for the purpose of extracting testimony from a defendant in order to obtain a basis for a perjury indictment, such an indictment must be dismissed. In United States v. Thayer, supra, the Court said:

"Where the defendant was, so to speak...within the sights of the Government [S.E.C.] and did not receive an explanation of the true import of the ...inquiry...the investigating agency cannot be allowed to 'zero-in,' so to speak, on the witness without advising him that if he persists he will be prosecuted for perjury. An indictment charging an offense which is entirely the word product of the Government cannot be upheld." 214 F.Supp. at 933.

In Brown v. United States, supra, the Court overturned a perjury conviction where it found that the defendant had been brought before the grand jury:

"...for the purpose of extracting testimony from him, with a view to prosecuting him for perjury and without any purpose of obtaining from him any evidence upon which, in whole or in part, it could find a true bill against anyone...."

A number of cases have dealt with similar situations involving witnesses appearing before legislative committees. In United States v. Icardi, 140 F.Supp. 383, 388 (D.D.C. 1956) the court, considering a case of perjury before such a committee, held that "extracting testimony with a view to a perjury prosecution [is not] a valid legislative purpose." See also, United States v. Cross, 170 F.Supp. 303 (D.D.C. 1959). The doctrine developed in these cases applies in a grand jury setting, according to the court in Brown v. United States, supra (245 F.2d at 555), which held that the principle applicable in grand jury proceedings had been "exactly stated" by the court in Icardi.

As the court pointed out in Icardi, one of the important factors indicating that the Congressional subcommittee in that case was questioning the defendant in order to elicit testimony forming the basis for a possible perjury indictment was the fact that the "...subcommittee already had in its possession sufficient information on which to base its report to Congress..." (140 F.Supp. at 388). The court made a similar inquiry in United States v. Cross, supra, in granting the defendant's motion for a judgment acquitting him of a charge of perjury.

In Cross, the legislative committee before which the defendant allegedly perjured himself had before it, prior

to calling the defendant, the directly contradictory testimony of several witnesses on the matter in issue. In addition, the committee had heard a prior denial by the defendant that he had any direct knowledge of the events in issue. In analyzing what the committee's purpose was in questioning the defendant further, the court observed:

"What facts then could the Committee expect to elicit from Cross upon his recall? What legitimate legislative purpose could be served by questioning him again regarding the incident? If the witness adhered to his prior testimony the Committee gained no additional facts. If he admitted that he was present at the time of the [events in issue]...., it would merely corroborate the information the Committee already had in its possession.... Whichever course the witness should take, what aid to the legislative purpose could we hope for by the Committee?" (170 F.Supp. at 309.)

The situation here is similar to that in Cross. What legitimate investigative purpose could have been served by questioning the defendant concerning what she had said to Stonesiefer. If Jacobs did not recall the conversation, the Grand Jury gained no additional facts. If Jacobs admitted what she said to Stonesiefer, the Grand Jury still gained no additional facts since the admissioner would merely corroborate information the Grand Jury already had - on tape - in its possession.

The prosecutor's continued questioning was designed not to uncover any new leads concerning the alleged crime

which was the subject of the Grand Jury's investigation. Rather, it was obviously calculated to exploit Jacobs' apparent lack of memory with respect to what she had said to Stonesiefer. The object of the exercise was to lock Jacobs into statements which could then be made the basis of an indictment for perjury.

It is to be noted that in the instant case the government acknowledges that defendant Jacobs was a "putative defendant". In United States v. Mandujano, supra, the government contests whether Mandujano was a "putative defendant".

In United States v. Mandujano, supra, the court's finding of "unfairness" was based upon the fact that it appeared that the prosecutor's primary purpose for asking the "putative defendant" incriminating questions was to "entrap" him into committing perjury. The failure of the special prosecutor, in the instant case, to play the recorded year earlier conversation to the "putative defendant" herein, clearly indicated an attempt to entrap into committing perjury. Fairness and due process required the prosecutor to refresh the memory of the "putative defendant" by playing the recorded conversation in his possession. United States v. Washington, 328 A.2d 98, 100 (D.C.C.A. 1974); United States v. Luxemburg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F.Supp. (N.D. Ohio 1968), cert. den. 400 U.S. 849, United States v. Wong, _____ F.2d _____ (9th Cir. No. 74-1636, September 23, 1974), petition for cert. pending No. 74-635.

It is submitted that the appellant's contention that disclosure in the grand jury of the existence of the tape recorded conversation to the "putative defendant", would violate F. R. Crim. P. 6(e) is a specious argument having no logical or legal foundation.

The District Court, herein, stated:

"Under the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct⁵. Had the questions serviced some useful investigatory function, the conclusion might be otherwise. But no suggestion has been made to the court that such a purpose lay behind the questions, and the court must agree with defense counsel's assessment that the questions which led to the alleged perjurious responses served no other function than to give the government an additional prop on which to base its case against defendant." (Appellant's Appendix F4,5).

The District Court correctly decided that under the totality of the circumstances that the entire grand jury proceeding was a violation of Jacobs' due process rights under the Fifth Amendment; the testimony obtained therein be suppressed and the perjury count, being based solely upon such testimony, be dismissed.

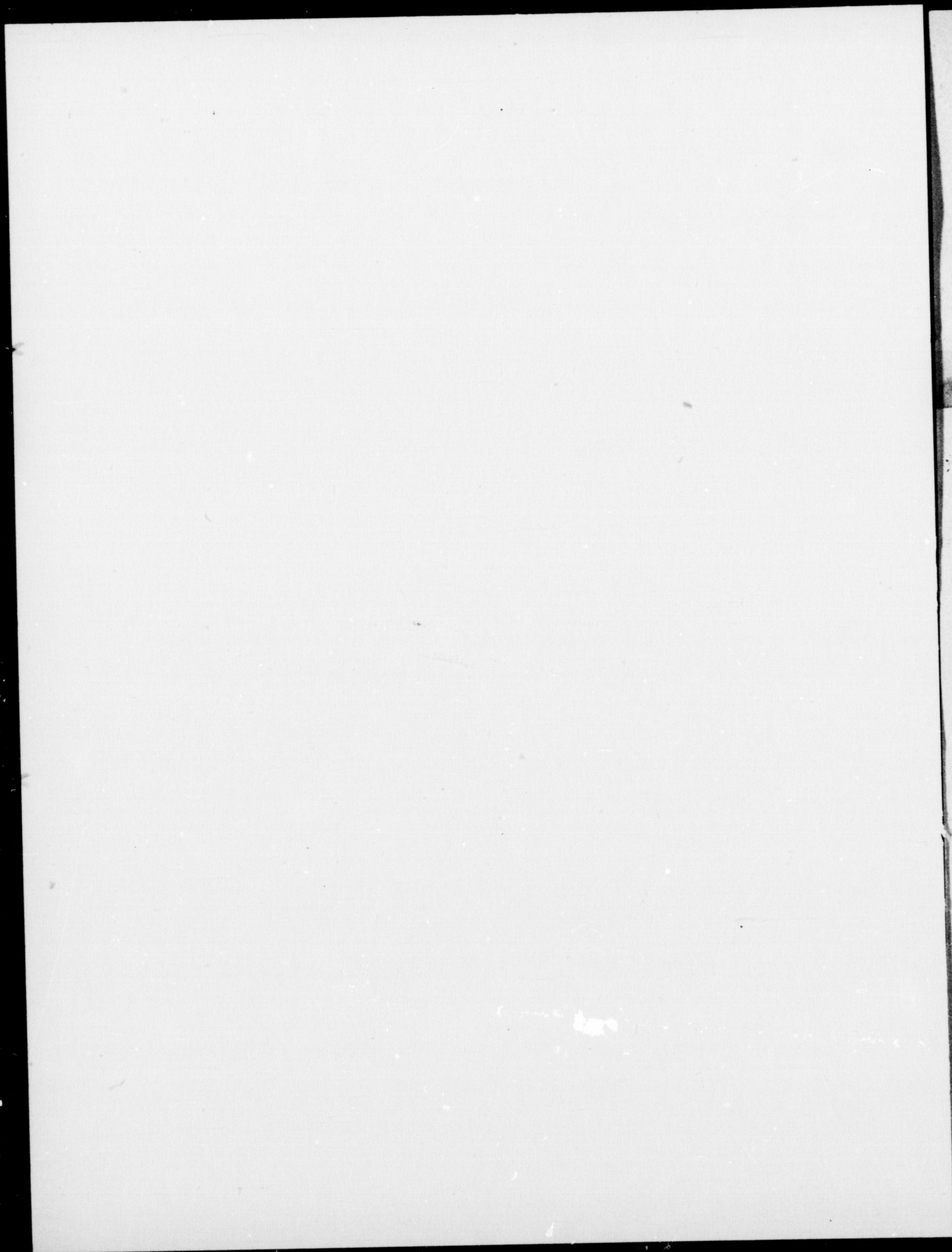
CONCLUSION

It is respectfully submitted that the decision of the District Court should in all respects be affirmed.

Respectfully submitted,

RUBIN, SEIDMAN & DOCHTER
Attorneys for Defendant-Appellee

IRVING P. SEIDMAN,
OF COUNSEL



M.S.V. Jacobs - Sudmar

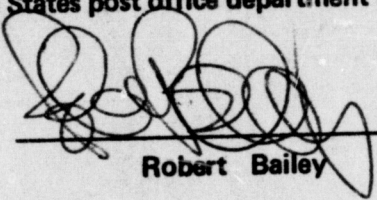
STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3 day of Nov 1975 deponent served the within Brief upon: *M.S. Attorney*

attorney(s) for *appellant*

in this action, at *225 Cadman Plaza East*
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 3
day of Nov, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976